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ATTORNEY FOR APPELLEE:

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IN THE MATTER OF THE
INVOLUNTARY TERMINATION
OF THE PARENT-CHILD
RELATIONSHIP OF M.Y.,
MINOR CHILD AND HIS MOTHER.

Appellee-Guardian Ad Litem.

[illegible]

No. 49A02-0706-JV-527

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Marilyn Moores, Judge
Cause No. 49D09-0610-JT-44307
49D09-0511-JT-43655

March 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Sherlene Y. (“Mother”) appeals the trial court’s involuntary termination of her parent-child relationship with M.Y., her minor child. On appeal, Mother raises one issue which we restate as whether Mother was denied due process because the trial court did not appoint counsel at the beginning of the Children In Need of Services (“CHINS”) proceedings. Concluding that Mother was not denied due process, we affirm.

Facts and Procedural History

On November 7, 2005, three days after M.Y.’s birth, a CHINS petition was filed that alleged M.Y. was born cocaine-positive and that Mother had a thirteen-year history of cocaine use. At the November 8, 2005, hearing on the CHINS petition, Mother admitted to the allegations and M.Y. was formally removed from Mother’s custody. Services to be completed toward reunification were ordered pursuant to the CHINS court’s “Participation Decree and Agreed Entry,” which required drug and alcohol assessments, drug and alcohol treatment, parenting classes and home based counseling, Mother’s visitation with M.Y., acquisition of safe and stable housing, maintenance of a legal and adequate source of income, weekly contact with the case manager, and establishment of paternity.¹ Appellant’s Appendix at 13 (Termination Order Finding of Fact #4).

¹ Paternity was established, and M.Y.’s biological father voluntarily terminated his parental

Mother was not represented by counsel at the November 8, 2005, CHINS hearing, and she did not request that counsel be appointed. The trial court subsequently learned that Mother has a learning disability, and on November 30, 2006, the court appointed counsel to represent Mother in both the CHINS proceeding and the termination of parental rights proceeding initiated on October 31, 2006.

As illustrated by the following findings of fact, the court's reasons for terminating Mother's parental rights were very specific:

7. Mother commenced home based counseling until she was unsuccessfully discharged on October 12, 2006, due to two cocaine positive screens at Valle Vista the previous month and a period of incarceration.
* * *
12. While attending the Project Home, Mother was given urine screens on Tuesdays. During 2007, Mother tested positive for cocaine on March 14 and 28, 2007. Her final urine screen taken on April 17, 2007, came back as a diluted sample.
13. Urine screen referrals were made by the family case manager to Valle Vista. These screens were set up to be random and were to be complied with for the duration of the CHINS and termination proceedings. The family case manager made four separate referrals for Mother to Valle Vista. The referrals were made on November 8, 2005, February 16, 2006, July 28, 2006, and February 6, 2007.
14. Mother took a total of seven screens through Valle Vista. Of the seven screens, three were positive for cocaine and one screen was diluted. In addition, there were concerns that samples for two other screens may not have been Mother's due to the temperature of the samples when tendered.
15. It is unclear whether Mother received the Valle Vista referral in February of 2007. Since she tested cocaine positive twice on non-random screens the following

rights.

month, it is inconsequential whether that referral was received.

16. An inpatient program through Harbor Light was successfully completed by Mother in January of 2006. By the number of subsequent positive urine screens since that time, Mother relapsed from the inpatient program.
17. In October of 2006, Mother was arrested for Attempted Murder and formally charged with two counts of Battery and Criminal Mischief and three counts of Criminal Recklessness.
18. During pretrial release of the above-mentioned charges, Mother was to take anger management classes and submit to urine screens. From November 6, 2006, to February 6, 2007, Mother tested positive for cocaine on five occasions and failed to report for screens nine times.

...

* * *

20. There is a history of instability in regards to Mother maintaining adequate housing. She has moved around and has either been evicted or left due to non-rent, using her disability check for accumulated drug bills rather than paying rent. Mother is currently residing in a one-bedroom apartment which was obtained on May 4, 2007.
21. Mother's income consists of six hundred twenty three dollars from Social Security Supplemental Income due to a learning disability. Although Mother claims she did not understand what services were needed for reunification due to her disability, she acted upon referrals received but just did not complete them. She understood that [M.Y.] was taken as a result of her cocaine use but still has consistently tested cocaine positive.

* * *

25. Mother's thirteen-year history of cocaine abuse and her inability to remain clean when knowing she is pregnant as well as knowing she is subject to urine screens is an indication that there is a reasonable probability that the reasons for [M.Y.'s] removal will not be remedied.²

Appellant's App. at 14-15.

² At the time of the termination hearing, Mother was pregnant. She admitted to using cocaine during the pregnancy.

Discussion and Decision³

Mother contends that she was denied her due process right to a fair hearing at the termination stage because the trial court did not appoint counsel at the initial CHINS hearing.

Mother claims it is undisputed that she is learning disabled, cannot read, and was unable to comprehend what was read to her at the CHINS hearing. Thus, she argues that she was deprived of notice as to what conduct could lead to the eventual termination of her parental relationship with M.Y.

Marion County Department of Child Services (“DCS”) contends that Mother waived this issue for appeal. DCS further contends that Mother at no time raised the due process issue before the trial court.

As we stated above, counsel was appointed for Mother in November 2006. Thus, she was represented by counsel for approximately seven months in both the CHINS and termination proceedings before the termination hearing was held in early June 2007. At no time during this period did Mother raise the issue that she was deprived of due process because counsel was not appointed at an earlier date. At the termination hearing, she raised the issue of confusion caused by her learning disability; however, she did not relate that confusion to a deprivation of due process. Mother’s failure to raise the issue below constitutes waiver on direct appeal. See Hite v. Vanderburgh County Office of Family &

³ DCS has filed a Motion to Strike Portion of the Record filed by Mother because she has included portions of the CHINS transcript and orders in the CHINS case that were not admitted into evidence at the termination hearing. We agree with DCS that this record material should not have been included in the record for this appeal. Because of the constitutional nature of the issue raised herein and the serious nature of termination of parental rights, however, we have looked at the disputed evidence and determined that it is immaterial to our decision. We therefore grant DCS’s motion to strike.

Children, 845 N.E.2d 175, 180-81 (Ind. Ct. App. 2006). This is true even though the issue waived is constitutional in nature. See id.; McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 194-95 (Ind. Ct. App. 2003) (because mother neither objected to any of the alleged deficiencies during the CHINS process nor argued during the termination proceedings that the alleged deficiencies constituted a deprivation of due process, the issue was waived). Waiver notwithstanding, we will address the merits of Mother's argument. See In re Infant Girl W., 845 N.E.2d 229, 239 (Ind. Ct. App. 2006) (noting "our preference [is] to resolve cases on their merits"), trans. denied.

Due process has not been precisely defined; however, the phrase expresses the requirement of fundamental fairness. In re M.M., 733 N.E.2d 6, 10 (Ind. Ct. App. 2000) (quoting E.P. v. Marion County Office of Family & Children, 653 N.E.2d 1026, 1031 (Ind. Ct. App. 1995)). The opportunity to be heard at a meaningful time and in a meaningful manner is the fundamental requirement of due process. In re T.W., 831 N.E.2d 1242, 1245 (Ind. Ct. App. 2005).

Although CHINS and termination proceedings are distinct, they are sufficiently related so that procedural irregularities in the CHINS proceedings may deprive a parent of due process with respect to termination of the parent-child relationship. In re A.P., 734 N.E.2d 1107, 1112-13 (Ind. Ct. App. 2000), trans. denied. In A.P., we held that the failure to provide parents with copies of the child's case plans in a CHINS proceeding "could have substantially increased the risk of error with respect to the termination of parental rights, in that [the parents] may have been deprived of some degree of notice as to what conduct on their part could lead to the termination of those rights." Id. at 1114. To determine whether

due process has been provided, a court must balance “three distinct factors”: the private interests affected by the proceedings; the risk of error created by the State’s chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure. Id. at 1112 (citing Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

With reference to the first factor, the parties to this appeal agree that the right to raise one’s child is more basic, essential, and precious than property rights and is protected by due process. See M.M., 733 N.E.2d at 10. Similarly, with reference to the third factor, the parties agree that the State has a significant interest in protecting children and advancing their best interests. Thus, resolution of this case turns upon the second factor, which is best stated as whether the appointment of counsel after the initial CHINS hearing deprived Mother of notice of what she needed to do to avoid termination of her parental rights.

Early in the termination hearing, Mother was asked what the CHINS court had ordered her to do to be reunified with M.Y. She responded that she was to give urine samples and to participate in parenting classes. Tr. at 126.⁴ She also responded in the affirmative when asked whether she was told that she could not test positive for drugs and that she had to provide suitable housing for her and her child. Id. at 126-27. Later in the hearing, upon being called by her public defender, she testified that her learning disability prevented her from understanding much of what was required of her. However, she acknowledged that she knew that she was supposed to give urine samples, cease using cocaine, and secure and maintain suitable housing. Id. at 223-25.

Between the date of the issuance of the “Participation Decree and Agreed Entry” in

the CHINS proceeding and the June 2007 hearing on the “Petition for Involuntary Termination of the Parent-Child Relationship,” Mother complied with a number of the reunification requirements. However, she repeatedly tested positive for cocaine and failed to acquire safe and stable housing as she used her only source of income (SSI benefits) to buy cocaine instead of pay rent. It was Mother’s repeated cocaine use and lack of stable housing that resulted in the termination of parental rights. Because she knew and understood the very requirements that prevented reunification and resulted in termination of her rights, we cannot say that she lacked notice thereof. Accordingly, we conclude that the appointment of counsel after Mother’s initial CHINS hearing did not result in a violation of due process.

Conclusion

Mother was not denied due process when counsel was not appointed at her initial CHINS hearing. Therefore, we affirm the trial court’s termination of her parental rights.

Affirmed.

FRIEDLANDER, J., and MATHIAS, J., concur.

⁴ Mother referred to urine samples as “drops.”